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No. ———

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

MICHAEL S. BLUESTEIN, *et al.*,
Petitioners,

v.

SAMUEL K. SKINNER,
Secretary of Transportation, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Federal Aviation Administration's "Anti-Drug Program for Personnel Engaged in Specified Aviation Activities" violate the Fourth Amendment's prohibition against unreasonable searches and seizures, insofar as that program requires hundreds of thousands of private sector employees in the commercial aviation industry, as a condition of retaining their positions, to submit to a permanent regime of suspicionless, repeated, unannounced, random and closely-monitored urine collection drug testing?

LIST OF PARTIES TO THE PROCEEDING

The petitioners in this proceeding, and in the proceeding below, are as follows: Air Line Pilots Association; Sheri Albert; Association of Flight Attendants; Association of Professional Flight Attendants; Michael S. Bluestein; Dean N. Chantiles; Independent Union of Flight Attendants; International Association of Machinists and Aerospace Workers; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; International Federation of Flight Attendants; Richard Linn; Charles McCune; Orange County Airport Association; Transport Workers Union of America; and Transportation-Communications International Union.

The respondents in this proceeding, and below, are Samuel K. Skinner, Secretary of Transportation and the Federal Aviation Administration. There are no other parties.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Michael S. Bluestein, *et al.*, petitioners in the court of appeals, respectfully petition this Court to issue a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit to review the decision and judgment in *Bluestein v. Skinner*, 908 F.2d 451 (Ninth Cir. Nos. 88-7503, 88-7508, 89-70024, 89-70111, 89-70138 & 89-70139; July 10, 1990).

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 908 F.2d 451 and is reprinted in the separate appendix to this petition ("Pet. App.") at 1a-15a.

JURISDICTION

The judgment of the court of appeals was issued on July 10, 1990. On September 24, 1990, the time for filing a petition for a writ of *certiorari* was extended by Justice O'Connor to and including November 7, 1990. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

The final rule of the Federal Aviation Administration ("FAA"), entitled "Anti-Drug Program for Personnel Engaged in Specified Aviation Activities," was dated November 21, 1988, published at 53 Fed. Reg. 47024, and is reprinted at Pet. App. 16a-163a.

STATEMENT OF THE CASE

A. Statement of Facts

On November 21, 1988, numerous agencies within the Department of Transportation ("DOT") simultaneously issued rules requiring that employers throughout the private transportation sector of the economy adopt extensive and mandatory employee urinalysis drug-testing programs. These programs require almost 4 million private sector transportation workers to submit to various testing requirements.[1]

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[1] In addition to the FAA rule governing employees in the commercial aviation industry, which is the subject of this litigation,

This case involves a constitutional challenge to the "random testing" requirement of the FAA rule, which provides that all private commercial aviation employers must subject *all* their employees in certain classifications to *suspicionless*, *repeated*, *unannounced*, and *closely-monitored* drug tests triggered by the employee's chance selection from the larger employee population.[2]

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the following drug testing rules, governing other transportation sector industries were issued on November 21, 1988: Coast Guard, *Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel*, 53 Fed. Reg. 47064 (maritime industry); Research and Special Programs Administration, *Control of Drug Use in Natural Gas, Liquified Natural Gas, and Hazardous Liquid Pipeline Operations*, 53 Fed. Reg. 47084 (pipeline industry); Federal Railroad Administration, *Random Drug Testing; Amendments to Alcohol/Drug Regulations*, 53 Fed. Reg. 47102 (railroad industry); Federal Highway Administration, *Controlled Substances Testing*, 53 Fed. Reg. 47134 (motor carrier industry); Urban Mass Transportation, *Control of Drug Use in Mass Transportation Operations*, 53 Fed. Reg. 47156 (urban mass transit).

The Bureau of National Affairs calculated that approximately 3,864,500 private sector transportation employees are subject to random testing under all of the DOT rules. BNA, National Report on Substance Abuse (November 23, 1988) at 1.

[2] Because the FAA rule mandates drug testing for commercial aviation industry employees under a variety of different situations, it merits emphasis at the outset that Petitioners challenge *only* the rule's "random testing" requirement. The FAA rule—and each of the other DOT rules—also requires a variety of other "types of testing," which include: (1) "pre-employment testing," under which applicants to certain positions must be tested prior to beginning in those positions; (2) "periodic testing," under which employees who are otherwise required to undergo periodic medical exams must include a drug test in the exams; (3) "post-accident testing," under which employees must be tested whenever their behavior may have caused an accident; (4) "reasonable cause testing," under which employees can be tested when management has reasonable cause to suspect use of illegal drugs; and (5) "testing after return to duty," under which employees who have previously been removed from their positions for illegal drug use must be tested after completing a rehabilitation program and returning to service. Pet. App. 148a-151a. None of these other "types of testing" are challenged in this action.

By the FAA's estimate, the "random testing" rule covers approximately 538,000 employees performing a wide variety of specified commercial aviation functions that the FAA considers to be safety or security related. Pet. App. 133a, 136a.[3] Any covered employee who does not comply with the rule's random and surprise demands for an immediate and closely-monitored urine collection session—in which the employee's moment-to-moment actions are rigorously controlled, *see infra* at 12 n.7—must be removed from her position and may be terminated from her employment. Pet. App. 139a-141a, 144a & 162a.

B. Statement of Proceedings Below

Petitioners in this case, and below, include individual employees engaged in various occupations within the commercial aviation industry who are subject to the FAA's "random testing" requirement, the principal labor organizations in that industry representing employees subject to the requirement, and an organization of aviation employees and employers subject to the requirement. All petitioners participated in the proceedings before the FAA relating to the promulgation of the FAA final rule, and in those proceedings opposed FAA adoption of a "random testing" requirement.[4]

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[3] Specifically, aviation employees performing duties in any of the following eight areas are subject to mandatory "random testing" for drug usage: (1) flight crew duties; (2) flight attendant duties; (3) flight or ground transportation duties; (4) flight testing duties; (5) aircraft or ground dispatcher duties; (6) aircraft maintenance or preventive maintenance duties; (7) aviation security or screening duties; and (8) air traffic control duties. Pet. App. 147a.

[4] The FAA's requirement of mandatory random drug testing was first proposed on December 9, 1986, in the FAA's Advance Notice of Proposed Rulemaking ("ANPRM") entitled "Control of Drug and Alcohol Use for Personnel Engaged in Commercial and General Aviation Activities." *See* 51 Fed. Reg. 44432. After receiving over 650 written comments, "the vast majority [of which] opposed random testing," the FAA expanded the random testing proposal on

After the FAA issued its rule requiring the "random testing" program at issue here, petitioners brought six separate actions in various courts of appeals challenging, *inter alia*, the constitutionality of the FAA's "random testing" requirement. All actions filed in courts of appeals other than the Ninth Circuit were voluntarily transferred to, and were then consolidated in, the Ninth Circuit.

Petitioners' central contention in the Ninth Circuit was that the FAA's program of suspicionless, repetitive, entirely unannounced, and random urine collection testing, when analyzed in terms of traditional Fourth Amendment concerns, is far more intrusive than any suspicionless search program ever validated by this Court.

Petitioners principally relied on this Court's admonition that "exceptions to the [Fourth Amendment's] requirement of individualized suspicion are generally appropriate *only* where the privacy interests implicated are minimal," *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985) (emphasis added), and petitioners pointed out that the drug testing programs previously approved by this Court were far less intrusive then those at issue here, *see Skinner v. Railway Labor Executive Ass'n*, —— U.S. ——, 57 L.W. 4324 (March 21, 1989) (up-

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March 14, 1988, in the Notice of Proposed Rulemaking ("NPRM"), entitled "Anti-Drug Program for Personnel Engaged in Specified Aviation Activities." *See* 53 Fed. Reg. 8368, 8370. The FAA received over 200 written comments to the NPRM, and again, a vast majority opposed random testing. The FAA also held a series of public hearings on the NPRM.

Among those who opposed random testing during the proceedings were the National Transportation Safety Board and the American Medical Association as well as most individual employees and virtually all unions and other organizations representing employees. Pet. App. 55a-58a.

On November 21, 1988, the FAA issued the final rule, which includes the "random testing" program at issue here.

holding program of one-time post-accident drug tests); *National Treasury Employees Union v. von Raab*, —— U.S. ——, 57 L.W. 4338 (March 21, 1989) (upholding program of preemployment drug testing with prior notice). On these bases, petitioners contended that the FAA's "random testing" program worked intrusions into individual privacy and dignity far beyond the "minimal" level that the Fourth Amendment tolerates in the absence of any individualized suspicion.

Although *Skinner* and *von Raab* did *not* involve programs of repetitive, unannounced, and random drug testing, the Ninth Circuit concluded that the FAA's program does not "require[] us to undertake a fundamentally different analysis from that pursued" in *Skinner* and *von Raab*. Pet. App. 13a (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 489 (D.C. Cir. 1989)). The court of appeals then concluded that, in light of *Skinner* and *von Raab*, the FAA program's repetitive, entirely unannounced, and random nature is "insufficient to tip the scales against the FAA drug testing program at issue here." Pet. App. 12a.

REASONS FOR GRANTING THE WRIT

The question presented by this *certiorari* petition—the constitutionality of a government requirement that hundreds of thousands of employees, as a condition of their continuing in their positions, submit to a permanent regime of repetitive, entirely unannounced, and random urine collection drug testing—is of the first magnitude.

Very simply stated, such suspicionless testing programs work *far deeper and far more pervasive intrusions into personal privacy and dignity than any suspicionless searches this Court has ever validated. See infra* at 8-14. Nonetheless, all levels of government are increasingly mandating such programs, so that today many millions of private and public sector employees are subjected to required programs of repetitive, unannounced, and random drug testing.

The FAA program alone, as we have noted, subjects over 500,000 employees to its "random testing" requirement, and the other DOT programs subject almost 3½ million employees to such testing. *See supra* at 2-3 n.1. Moreover, the federal government now requires such random testing for over 345,000 federal employees, the Department of Defense now requires such testing for a vast (albeit undetermined) number of employees of defense contractors, and, as the litigated cases show, many state and local governments have imposed such testing programs on their own employees.[5]

By any fair measure, then, these recently instituted government programs of urine collection drug testing constitute government intrusions into individual dignity and privacy interests on an unprecedented scale; these programs thus represent a radical expansion of government power over the individual.

Yet the courts of appeals have been validating these programs *without any close judicial examination* of the unique Fourth Amendment issues that such suspicionless searches pose. In urging the validity of these programs, government attorneys have asserted—and the courts, including the court below, have accepted without analysis—that this Court's decisions in *Skinner v. Railway Labor Executives' Association, supra,* and *National Treasury Employees Union v. von Raab, supra,* have already dispositively settled the constitutionality of "*random* drug

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[5] *See* Havermann, *U.S. Details Plans For Drug Tests,* Washington Post (May 4, 1988) at A1 (over 345,000 federal employees subject to random testing); *see also* Office of Workplace Initiative, National Institute on Drug Abuse, *Report to Congress: Federal Agency Drug-Free Workplace Programs, Tier I Agencies* (March 29, 1988). *See also* Department of Defense, *Federal Acquisitions Regulations Supplement; Drug-Free Work Force,* 53 Fed. Reg. 37763 (September 28, 1988), supplemented by *Questions and Answers Prepared by Defense Department on Drug Free Workplace Regulations for Federal Contractors,* BNA Daily Labor Report (April 10, 1989) at G-1 (requiring random drug testing of employees of defense contractors).

testing" programs. But *Skinner* and *von Raab* did *not* concern comparable testing programs. Thus, these massive and unique programs, which govern the working lives of millions, are being approved and enforced despite the fact that this particular kind of testing has *never* been subjected to independent judicial appraisal under the proper constitutional standards.

In large part the legitimacy—and the moral force—of judicial review rests on the assurance that the courts in interpreting the Constitution will engage in reasoned and principled decision making. Approval of the widespread, highly intrusive search programs at issue here on the basis of lower court speculations as to how far this Court intended to move the Fourth Amendment law in its *Skinner* and *von Raab* opinions does not, we submit, constitute such decision making.

In sum, the decision as to whether the government may constitutionally require individuals who are not suspected of any wrongdoing to be subject to mandatory, repeated, entirely unannounced, and random urine collection drug tests should *not* be treated as a decision arrived at *sub silentio* in *Skinner* and *von Raab*. Rather, this constitutional question should be treated as one raising an open issue to be decided by this Court after squarely confronting the uniquely intrusive aspects of these unprecedented testing programs.

I. Government Programs Of Mandatory Drug Testing On A Repetitive, Entirely Unannounced And Random Basis Work Intrusions Into Privacy That Are Far Greater Than The Intrusions Worked By The *Skinner* And *von Raab* Programs And Thus Present Important And Unresolved Fourth Amendment Issues.

A. In his argument to this Court in *National Treasury Employees Union v. von Raab*, then-Solicitor General Charles Fried made explicit that the pre-employment drug testing program at issue in that case presented a

legal question far different from the constitutional question that so-called "random testing" programs present:

> [T]he random kind of testing . . . is not before you. * * *
>
> If we have a case in which a much larger population is tested or where the method is random drug testing, than I would hope the Court will consider that case on the record that will then be established after it has been sorted over and digested by courts below. But we ask neither that we get a hint or a signal helping us out in those cases, but we hope that nothing will be said to preclude them either. That really lies in the future. [Transcript of Oral Argument, *von Raab*, *supra*, at 42-43 (November 2, 1988).]

Similarly, Attorney General Richard Thornburgh, in arguing *Skinner v. RLEA*, stressed that post-accident testing also presented a far different legal issue than that presented here:

> I think it's significant to note that the regulations did not call for the testing of all employees or for periodic random testing procedures. They were tied instead to specific events . . . defined by objective standards. [Transcript of Oral Argument, *Skinner*, *supra*, at 13 (November 2, 1988).]

Thus, as these statements show, the government, in presenting *Skinner* and *von Raab*, fully understood that the relatively narrow testing programs challenged in those cases involved far lesser intrusions into privacy than do "random testing" programs like the one now at issue. Moreover, the government further understood that this difference in intrusiveness is of constitutional significance.

Under this Court's jurisprudence, the constitutionality of any *suspicionless* search program turns on whether the program—in its particulars and in its context—can properly be characterized as "minimally intrusive" into an individual's legitimate privacy and dignity interests. Put

simply, it is *a precondition* of a constitutional suspicionless search program that the program involves no more than a "minimal" intrusion into privacy. *See New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985) ("exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated are minimal").

Far from questioning this principle, *Skinner* and *von Raab* expressly reaffirmed it. In *Skinner*, the Court explicitly referred to this doctrine as establishing the framework for its analysis:

> In limited circumstances, *where the privacy interests implicated by the search are minimal* and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of [individualized] suspicion. [*Skinner*, 57 L.W. at 4330 (emphasis added).]

And in *von Raab* the Court noted in detail those factors concerning the testing program there at issue which "reduce[d] to a minimum any unsettling shows of authority" and worked to "significantly minimize the intrusiveness of the . . . drug screening program." *Von Raab*, 57 L.W. at 4342-4343 n.2 & 4344 n.4.

The *Skinner* and *von Raab* decisions thus focused on the particulars of the programs before the Court in those cases, and those decisions rest on the Court's conclusion that the programs there had been structured with sufficient limits and safeguards so as to be no more than "minimally intrusive." Indeed, in *Skinner*, the Court went on to admonish that precisely because urine collection tests "require employees to perform an excretory function traditionally shielded by great privacy," the intrusions of such testing programs into personal privacy

will "*not* [be] characterize[d] . . . as minimal in most contexts." 57 L.W. at 4330 (emphasis added).[6]

B. The permanent regime of repetitive, entirely unannounced and random urine collection drug tests at issue here is vastly more intrusive into the privacy and dignity interests of those made subject to it than the testing programs that this Court sustained in *Skinner* and *von Raab*. Given that the governing legal standard is that a suspicionless search program is constitutional *only* if the program works no more than minimal intrusions into dignity and privacy, it follows that *Skinner* and *von Raab cannot* be viewed as having decided this case.

Under the FAA's "random testing" program, aviation employers must randomly select employees from their covered workforce on a regular basis (using a computer system or other approved means of random selection), and must then, without *any* prior notice or warning, compel those employees promptly to undergo closely-monitored urine collection procedures. The program envisions continuing, sudden, and suspicionless drug tests, leaving each covered employee in the industry ever-conscious of the realistic prospect that she may at any time be made to submit to a sudden and unannounced urine test. And this regime will govern each covered employee for the remainder of her worklife, regardless of how often she has

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[6] As this Court explained, it is entirely reasonable for an individual to feel that her privacy and dignity have been invaded by a government demand for a monitored urine test:

> "There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom." . . . [T]he collection and testing of urine [therefore] intrudes upon expectations of privacy that society has long recognized as reasonable. [*Skinner*, 57 L.W. at 4328 (quoting *National Treasury Employees Union v. von Raab*, 816 F.2d 170, 175 (5th Cir. 1987)).]

been tested, how uniformly innocent her prior tests, or how unblemished her work and health records.[7]

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[7] Each time an employee is selected for a urine collection, she must follow a rigidly prescribed and closely scrutinized course of conduct surrounding her giving of a urine sample. *See* DOT, *Procedures for Transportation Workplace Drug Testing Programs*, 53 Fed. Reg. 47002 (November 21, 1988).

Upon selection, she must immediately report to a "collection site," which may be a public restroom or other area which her employer has designated, and which must be secured against unauthorized personnel. 53 Fed. Reg. 47006.

At this site, a "collection site person" will scrutinize the employee's conduct. 53 Fed. Reg. at 47006. The employee must: (1) prove her identity to the "collection site person"; (2) remove her "unnecessary outer garments such as a coat or jacket" and leave them and any other personal belongings (other than a wallet) in the presence of the "collection site person"; (3) wash her hands; and (4) after washing, remain in the presence of the "collection site person" in a location that does not provide access "to any water fountain, faucet, soap dispenser, cleaning agent or any other materials which could be used to adulterate the specimen", *id.* at 47007. Throughout this process, the "collection site person" is charged to "note [in writing] any unusual behavior or appearance" of the employee. *Id.*

At this point the employee is normally permitted to perform the act of urination outside the direct observation of the "collection site person"—*viz.*, "in the privacy of a stall or otherwise partitioned area," *id.* at 47007—but the employee must remain in sufficiently close physical proximity so that the "collection site person" is able to ensure that no effort at adulteration of the specimen is attempted and to record any "unusual behavior." *Id.*

After receiving the specimen of the employee, the "collection site person" measures its volume and, if the specimen is of insufficient volume, the "collection site person" requires the employee to produce an additional urine sample. The employee "may be given a reasonable amount of liquid to drink for this purpose." *Id.* at 47007. The "collection site person" then measures the temperature of the specimen to assure that the urine is within the temperature range for a normal urination, examines the specimen for any other signs of adulteration, and then seals, labels, and secures the specimen. *Id.*

"Whenever there is reason to believe that a particular [employee] has altered or substituted the specimen" the employee will be required to urinate again as "soon as possible under the direct observation" of the "collection site person." *Id.* at 47008.

In at least three critical regards, a "random testing" program such as the FAA's works a significantly more intrusive invasion on employee privacy and dignity than *Skinner's* post-accident testing program or *von Raab's* pre-employment testing program.

First, under post-accident and pre-employment testing, a urine collection test will be a rare (and possibly even a one-time) event in an employee's worklife. In contrast, the very essence of the FAA's "random testing" program is the requirement of repeated urine collections for each covered employee throughout her worklife. Under the program here, invasive demands, and the apprehension of such demands, are—and henceforth will be—a part of every covered employee's work day for the remainder of the employee's career.

Second, unlike pre-employment or post-accident testing, the FAA's "random testing" is *entirely* a function of the fact that the employee has chosen to pursue a certain occupation; the testing is not triggered by any more individualized, or more proximate, event that might rationally justify to an employee why she must submit to the government's continuing urine collection demands. Given the fact that monitored urine testing is uniquely objectionable to many individuals precisely because the test is widely perceived as dehumanizing, the absence of any individualized reason for the test further increases the affront. *Compare Skinner*, *supra* (testing based on one's involvement in a serious accident that one may have caused); *Von Raab*, *supra* (testing prior to beginning new safety-related job after applying to job with knowledge of testing requirement).

Third, the inherently intrusive nature of the FAA's "random testing" is substantially exacerbated by the requirement that each test here be *entirely unannounced*. It is too plain for argument that the absence of *any* advance notice of an anxiety-producing search is a factor of major significance in heightening the intrusiveness of the

search and of the search demand. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 558-559 (1976) (preventing surprise reduces intrusion); *Wyman v. James*, 400 U.S. 309, 320 (1971) (same); *see also Michigan v. Tyler*, 436 U.S. 499, 513-514 (1978) (Stevens, J. concurring in part) (stressing constitutional importance of prior notice in warrantless searches). Here, because the affected employee is yanked from her normal work routine without any warning, the FAA's program dramatically increases the inherent tendency of drug testing to cause indignity, fright, and concern. *See von Raab*, *supra*, 57 L.W. at 4342, n.2 (intrusiveness of pre-employment drug test was "significantly minimize[d]," because job applicants are "notified [five days] in advance of the scheduled sample collection"). Given the lack of any rational public need for eliminating *all* advance warning, this aspect of the program must be viewed as an especially egregious government invasion of reasonable privacy expectations.

C. Taken together, these factors make clear that the purpose and effect of the FAA "random testing" program is to create in each and every individual who works in a covered occupation a realistic, continuing, and ever-present apprehension that at any moment, and without reason or warning, she may be subjected to a highly invasive urine collection demand. While we believe that the intrusiveness of such a program simply cannot be deemed "minimal"—and that the program is therefore unconstitutional—for present purposes it is enough that these factors certainly render the program legally distinct from those at issue in *Skinner and von Raab*. Since millions are now being subject to such constitutionally controversial programs, this case raises a substantial question that should be resolved by this Court.

II. The Courts Of Appeals—Including The Court Below—Have Erroneously Assumed That *Skinner* And *von Raab* Decided The Validity Of Repetitive, Unannounced And Random Drug Testing And They Are Thus Not Independently Examining The Issue.

A. The panel below devoted the bulk of its opinion to a discussion of *Skinner* and *von Raab*, concluding that the FAA's interest in preventing drug use among aviation employees is at least as important as the analogous governmental interest in preventing drug use among railroad employees (*Skinner*) and customs employees (*von Raab*). Pet. App. 8a-12a. But we had never questioned this proposition; rather we had argued that the FAA's repetitive, unannounced, and random testing program is *far more intrusive* than the more benign programs at issue in *Skinner* and *von Raab*, and cannot be deemed only "minimally intrusive" into individual privacy interests.

The panel's response to our argument was that "the Fourth Amendment issue in this case cannot be meaningfully distinguished from the Fourth Amendment issue addressed by the Supreme Court in [*Skinner* and] *von Raab*." Pet. App. 13a. The panel's discussion to support this conclusion is largely contained in one paragraph of the opinion in which the panel followed a previous D.C. Circuit decision which had similarly held a "random testing" program legally indistinguishable from the programs approved by this Court in *Skinner* and *von Raab*. *See* Pet. App. 12a-13a (*citing* and *quoting Harmon v. Thornburgh*, 878 F.2d 484, 489 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 865 (1990)).[8]

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[8] Virtually the entire discussion of the issue in the court of appeals decision below was as follows:

> Although [such factors as the repetitive, random and unannounced nature of the program] add some weight to the "invasion of privacy" side of the Fourth Amendment balance, they are insufficient to tip the scales against the FAA drug testing

The decision below did *not* independently assess the FAA program's intrusiveness into privacy and dignity interests to determine whether these intrusions exceed the "minimal" level that the Fourth Amendment tolerates in the absence of individualized suspicion. Indeed, the court never acknowledged the clearly established legal principle —which both *Skinner* and *von Raab* acknowledged—that suspicionless search programs are constitutional *only* if no more than "minimally intrusive" into privacy and dignity.[9] Instead, the panel concluded, following *Harmon v. Thornburgh*, *supra*, that *Skinner* and *von Raab* had validated drug testing programs for safety and security related positions generally, so that differences in the in-

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program at issue here. The reasoning of the D.C. Circuit in *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), is instructive. In *Harmon*, the court upheld (as to some employees) a Justice Department testing plan that provided for random testing and notice "on the same day, preferably within two hours, of the scheduled testing." 878 F.2d at 486 (interior quotation omitted). The court noted:

> Certainly the random nature of the OBD testing plan is a *relevant* consideration and, in a particularly close case it is possible that this factor would tip the scales. We do not believe, however, that this aspect of the program requires us to undertake a fundamentally different analysis from that pursued by the Supreme Court in *von Raab*.

Id. at 489. This is particularly true in light of the FAA's reasonable conclusion that random testing without advance notice will prove to be a greater deterrent that testing with advance notice. [Pet. App. 12a-13a.]

[9] *See, e.g., Skinner, supra*, 57 L.W. at 4330 (noting that it is a precondition to a suspicionless search program's validity that "privacy interests implicated . . . are minimal"); *von Raab, supra*, 57 L.W. at 4342-4343 n.2 (noting factors which "significantly minimize [testing] program's intrusion on privacy interests"); *see also New Jersey v. T.L.O., supra*, 469 U.S. at 342 n.8 (1985) ("exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated are minimal"). *See generally supra* at 9-11.

trusiveness of particular programs might, at most, be "relevant consideration[s] . . . in a particularly close case." Pet. App. 13a (*quoting Harmon*, 878 F.2d at 489).

Given this treatment, it is clear that the court below did *not* give independent, reasoned consideration to the substantial constitutional issues in this case: the court instead assumed that those issues were decided *sub silentio* in *Skinner* and *von Raab*.

B. This understanding of the decision below is bolstered by an examination of the D.C. Circuit decision upon which the court below relied. For the *Harmon* decision is also bereft of any serious analysis of the constitutional issues presented by "random testing" programs, and a review of *Harmon* makes unmistakably clear that the D.C. Circuit panel had assumed that those issues had already been decided *sub silentio* by this Court.

Harmon began its discussion of "random testing" by complaining that neither the *Skinner* nor *von Raab* case stated a clear rule for distinguishing "legitimate drug-testing programs . . . from illegitimate ones," 878 F.2d at 488, and by conceding that "[t]he invasion of privacy occasioned by [random and repetitive programs] might . . . be regarded as different in kind from the intrusion[s] at issue" in *Skinner* and *von Raab*. *Id.* Indeed, the *Harmon* panel expressly recognized that "a coherent theory might be constructed which would make [random and repetitive selection] a fundamental distinction." *Id.* at 489. But *Harmon* then rejected this possibility, stating that "the Supreme Court has not encouraged the construction of such a theory." *Id.* The principal basis given for this conclusion was that in *von Raab* much of the discussion of the need for minimizing the intrusiveness of testing "was confined to a footnote." *Id.* (citing *von Raab*, 57 L.W. at 4342 n.2).

Thus, the *Harmon* court, just like the court below, failed to independently assess the constitutional issues presented by the "random testing" programs and instead as-

sumed that these issues were decided *sub silentio* in *Skinner* and *von Raab*.

C. Unfortunately, the Ninth Circuit and D.C. Circuit are not alone in their failure to confront the question presented here. Their common method of approach—that *Skinner* and *von Raab* should be read as broadly validating "random testing" programs—is the one that the lower courts are routinely following.

For example, the Fourth Circuit, in *Thomson v. Marsh*, 884 F.2d 113, 114 (4th Cir. 1989), issued a brief *per curiam* opinion which simply—and erroneously—stated that in *Skinner* and *von Raab* "the Supreme Court decided that random drug tests do not violate the Fourth Amendment." And the Seventh Circuit disposed of a similar case by noting *Harmon* with approval. *See, Taylor v. O'Grady*, 888 F.2d 1189, 1199-1200 (7th Cir. 1989).[10] Obviously neither of these circuits engaged in the proper independent assessment of these testing programs' intrusiveness into personal privacy; for these courts, the constitutionality of such programs had already been decided by this Court *sub silentio*.[11]

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[10] The Seventh Circuit's *Taylor* decision does not actually reach the specific issue of the validity of "random testing" programs such as the instant one; rather the testing program in *Taylor* was one in which each employee was required to submit annually to a surprise testing demand. *See Taylor, supra*, 888 F.2d at 1198.

[11] (a) The law in two other circuits, although not entirely clear, also may rest on the premise that *Skinner* and *von Raab* settle the constitutionality of "random testing."

The First Circuit, in *Guiney v. Roache*, 873 F.2d 1557 (1st Cir.), *cert. denied*, 110 S.Ct. 865 (1989) remanded a "random testing" case to the district court for disposition in light of *Skinner* and *von Raab*. Although the opinion's wording does not state in so many words that the "random testing" issue had been decided by this Court, both parties seem to have construed the opinion as holding that further challenge on the issue was foreclosed by this Court's decisions. *See* Petition for a Writ of *Certiorari, Guiney v. Roache*,

For the reasons already given, *supra* pp. 8-14, the judgment as to whether the Constitution permits widespread, suspicionless, repetitive, unannounced and random searches of the kind at issue here is one that should be rendered after this Court has squarely confronted that question; such search programs should not be permitted to proliferate on the basis of lower court intuitions on how far the *Skinner* and *von Raab* opinions were intended *sub silentio* to extend. Fidelity to the Fourth Amendment demands at least that these issues be confronted and—as we will show in the full briefing of this case—in fact demands far more.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of *certiorari* to review the decision of the Court of Appeals for the Ninth Circuit in this case.

No. 89-205; Respondent's Brief in Opposition, *Guiney v. Roache*, *supra*.

Similarly, the Sixth Circuit, in *Penny v. Kennedy*, —— F.2d —— (6th Cir. No. 86-6280; October 4, 1990) (*en banc*), recently remanded two "random drug testing" cases to district courts for further consideration in light of *Skinner* and *von Raab*. While the majority opinion is open to more than one reading, two judges within the majority stated that—although they believed that "random testing" programs are unconstitutional—they also believed that *Skinner* and *von Raab* had indeed validated such programs and thus foreclosed any holding of unconstitutionality. *See, id.* (Martin J. concurring) ("Despite my view that random drug testing violates the fourth amendment, recent Supreme Court decisions [*Skinner* and *von Raab*] clearly uphold the general constitutionality of random drug testing").

(b) In addition, the Third and Eighth Circuits have explicitly upheld random testing programs, but had done so prior to this Court's *Skinner* and *von Raab* decisions. *See Transport Workers Union, Local 234 v. SEPTA*, 884 F.2d 709 (3d Cir. 1989) (upholding "random testing" programs based on pre-*Skinner* and pre-*von Raab* law of the circuit); *Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988) (upholding "random testing" program based on rationale different from that adopted in *Skinner* and *von Raab*).

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